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09/936,994	09/19/2001	Masayuki Matsui	2001-1309A	2875

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EXAMINER

PADEN, CAROLYN A

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 05/12/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/936,994	Applicant(s) MATSUI ET AL.
	Examiner Carolyn A Paden	Art Unit 1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 19 September 2001 .

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-18 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-5, 7-18 is/are rejected.

7) Claim(s) 6 is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. ____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) Notice of References Cited (PTO-892) 4) Interview Summary (PTO-413) Paper No(s). _____ .
2) Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) Notice of Informal Patent Application (PTO-152)
3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ . 6) Other: _____ .

The disclosure is objected to because of the following informalities: The specification and claims contain the recitation "erucinic acid" and this fatty acid appears to the examiner to be "erucic acid". Clarification is requested.

Appropriate correction is required.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 4, 7, 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Giddey et al in view of Swern (article) and Padley (US 5,508,048) taken together.

Giddey discloses an aqueous foaming composition containing chocolate. Example 4 shows milk chocolate made from cocoa butter and another fat in addition to the other chocolate ingredients that are formed together to make a chocolate. Then foam is added and the composition of the foam is shown in example 2. Claim 1 appears to differ from the reference in the suggestion that the chocolate contains a triglyceride that

has behenic acid in it. Swern teaches that when air is whipped into solid fat the texture of the fat improves. The fats particularly tested were low erucic rapeseed oil and hydrogenated oil. Padley also teaches that erucic oils can be hydrogenated to form behenyl acid oils (the saturated version of erucic oil) and further teaches that these fats act to create excellent chocolate fats with good anti-blooming properties. Thus the secondary references, when taken together, show that triglycerides that contain behenic acid are well known for use in chocolate, that hydrogenation converts erucic acid to behenic acid and that the texture of solid fat improves upon foaming. It would have been obvious to one of ordinary skill in the art to utilize a triglyceride containing behenic acid in the chocolate of Giddey as a substitute for cocoa butter fat because of the qualities of fat product that are shown in Padley and Swern. The Padley fat is compatible with chocolate fat because of its ability to display good anti-blooming properties and thus would have qualified as one of the fats suggested in example 4, line 8 of Giddey. Claim 7 appears to differ from the reference in the suggestion of the use of a particular melting temperature for melting the oil or fat crystals. Although Giddey teaches using a temperature of 50C, it would have been obvious to adjust the melting temperatures of Giddey to a

temperature sufficient to melt the fat crystals. No unobvious or unexpected results are seen to flow from the selection of the particular temperature range of the reference.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Giddey et al in view of Swern (article) and Padley taken together as applied to claims 1, 3, 4, 7 and 12 above, and further in view of Loders.

Claim 2 appears to differ from the reference in the suggestion of the amount of behenic acid in the fat. The use of a fat with 40% BOO is well known in the art for use in chocolate as shown by Loders. Thus it would have been obvious to utilize the fat of Loders in the chocolate of Giddey in order to provide a foamed chocolate with a known chocolate substitute that contains behenic acid.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Giddey in view of Swern and Padley taken together as applied to claims 1, 3, 4, 7 and 12, above, and further in view of Sassen (WO 95/07620).

The claims appear to differ from Giddey in the suggestion that a particular level of trisaturated triglycerides is used. But Sassen teaches, at page 6, line 26-27, that levels of trisaturated triglycerides in fat

compositions that have been chemically modified should be restricted to <5 wt %. Thus even though Giddey does not mention the amount of tribehenic acid that is in the product, one of ordinary skill in the art would be led to use the low levels of the claim 5 from the prior art suggestion of Sassen.

Claims 13-18 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Cain et al (5,731,027) and see the array of fats shown at column 2, lines 18-42.

Claims 15 and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 6 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 15 and 18 refer to the low melting point fat as being a hard butter. Examiner is confused as to how this combination can occur.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone

number is 703-308-3294. The examiner can normally be reached on Monday to Friday from 7am to 3:30pm.

The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

Carolyn Paden
CAROLYN PADEN 5-8-03
PRIMARY EXAMINER 1761